IN THE

Supreme Court of the United States

OCTOBER TERM, 1940
No. 553

JOSEPH C. LENIHAN and JOSEPH P. KILROY, in their own behalf as subscribers and users of the services of THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, a corporation, and on behalf of all persons, corporations and associations within the Metropolitan Area of St. Paul, Minnesota, who are similarly situated and as may care to join in this action,

Petitioners,

and

CITY OF ST. PAUL, a municipal corporation,

Intervener-Petitioner,

vs.

THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, a corporation, and

CHARLES MUNN, HJALMAR PETERSEN and FRANK W. MATSON, individually and as members of the Railroad and Warehouse Commission, THE RAILROAD and WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA, J. A. A. BURNQUIST, individually and as Attorney General of the State of Minnesota,

Respondents.

PETITION FOR WRIT OF CERTIORARI, ASSIGNMENT OF ERRORS AND BRIEF IN SUPPORT OF PETITION.

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Review Publishing Co., 141 E. Fifth St., St. Paul, Minn.

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PETITION FOR WRIT OF CERTIORARI, ASSIGNMENT OF ERRORS AND BRIEF IN SUPPORT OF PETITION.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Joseph C. Lenihan, Joseph P. Kilroy and City of Saint Paul, a municipal corporation, of the County of Ramsey, State of Minnesota, jointly and severally, pray that a Writ of Certiorari issue directing the Supreme Court of the State of Minnesota to certify to this Honorable Court, for its review and determination, the cause therein entitled, "Joseph C. Lenihan and Joseph P. Kilroy, in their own behalf as subscribers and users of the services of the Defendant and on behalf of all persons, corporations, and associations within the Metropolitan Area of St. Paul who are similarly situated and as may care to join in this action, Plaintiffs, Respondents, vs. The Tri-State Telephone and Telegraph Company, a corporation, Defendant and Appellant, and Charles Munn, Hjalmar Petersen and Frank W. Matson, individually and as members of the Railroad and Warehouse Commission, The Railroad and Warehouse Commission, of the State of Minnesota, J. A. A. Burnquist, individually and as Attorney General of the State of Minnesota, Defendants, Respondents, and City of St. Paul, Intervener, Respondent, and City of Minneapolis, Intervener, Respondent," being cause No. 32425 of the Supreme Court of the State of Minnesota, wherein the final judgment of said State Supreme Court reversing the judgment of the District Court in and for the County of Ramsey, State of Minnesota, was entered on the 21st day of August, 1940, this petition being presented and filed in this Honorable Court on the .... day of November, 1940, within three months after the entry of said final judgment.

The petitioners present herewith and file a duly certified Transcript of the Record in this cause, including the proceedings in said State Supreme Court, in this cause. The petitioners herewith furnish and deliver ten copies of the Record and the proceedings and opinion of the said State Supreme Court, in this cause so certified. (Rec. pp. 1 to 147 incl.; Sup. Rec. pp. 1 to 93 incl.; Rec. Proc. St. Sup. Ct. pp. 1 to 41 incl.)

The petitioners, Joseph C. Lenihan and Joseph P. Kilroy, plaintiffs-respondents, and the petitioner, City of Saint Paul, intervener-respondent in said cause in said State Supreme Court herein, jointly and severally, show:

SUMMARY STATEMENT OF MATTER INVOLVED.

The Railroad and Warehouse Commission of the State of Minnesota, on its own motion, by a resolution and order dated February 15, 1932, "In the Matter of Investigation for the Reduction of Telephone Rates of The Tri-State Telephone and Telegraph Company in the City of Saint Paul, Metropolitan Area," duly instituted and thereafter conducted a telephone rate proceeding pursuant to and in accordance with the provisions of Chapter 152, Minnesota Session Laws 1915. The said proceeding was culminated, save for the appeals hereinafter mentioned, by the order of the Commission made and filed in said proceeding, dated March 31, 1936, prescribing a new schedule of telephone rates respecting said metropolitan area, effective on the several billing dates next following May 31, 1936. The new schedule of rates promulgated by said order represented a reduction as respects the pre-existing telephone rates applicable to said metropolitan area, approximating 25 per cent (Record, p. 14 to 27 incl.) (Rec. Proc. St. Sup. Ct. pp. 2, 3) (Record, pp. 39, 40, Dist. Ct. Mem.)

The Tri-State Telephone and Telegraph Company, defendant-appellant, pursuant to the statute, appealed from said order to the District Court of Ramsey County, Minnesota. The said District Court, upon said appeal, entered its judgment, August 10, 1937, sustaining said order and

adjudicating the rates thereby prescribed reasonable and not confiscatory. The Company appealed from said District Court judgment to the Supreme Court of the State of Minnesota, upon which appeal said State Supreme Court filed its decision February 24, 1939, sustaining said District Court judgment. The Company procured a stay of the proceedings in the State Supreme Court until June 5, 1939, during which time it might submit a motion for re-argument, or seek a review by the United States Supreme Court. (Record, p. 1 to 33 incl. Plaintiff's complaint).

The Commission during the pendency of said stay of proceedings, on May 2, 1939, made and filed its order entitled, "In the Matter of Rates and Charges for Exchange Telephone Service by The Tri-State Telephone and Telegraph Company in the Saint Paul Metropolitan Area, and by The Northwestern Bell Telephone Company in the Minneapolis Metropolitan Area," purporting to prescribe a new and uniform schedule of telephone rates for said metropolitan areas of Saint Paul and Minneapolis, effective on billing dates on and after June 1, 1939. (Record, p. 28 to 33 incl.) (Rec. Proc. St. Sup. Ct. p. 3).

The schedule of rates which said last mentioned order of May 2, 1939 purported to prescribe represented a reduction respecting the telephone rates then in effect pertaining to the metropolitan area of Minneapolis approximating twelve and one-half per cent, and as respects the metropolitan area of Saint Paul the same represented a substantial increase, over the rates promulgated by said Commission's order of March 31, 1936, which was the subject of the aforesaid appeals, and by comparison with the rates which existed immediately prior to the effective date of said

last mentioned order, the same represented a reduction approximating only twelve and one-half per cent in lieu of the reduction afforded by the rates prescribed by the said order of March 31, 1936 approximating twenty-five per cent.

The said order, dated May 2, 1939, was entered by said Commission based only upon its recitals of an alleged agreement for its entry between the Commission and the Companies thereby sought to be regulated, and undisclosed and unrecorded information. The said order dated May 2, 1939 was entered without the filing of a complaint by either of said companies, the Attorney General or a subscriber, and without any order of the Commission inaugurating an investigation or proceeding as the basis for the same. The said order was entered without any notice or hearing, formal or otherwise, without any evidence having been adduced before the Commission, without any findings of fact based on evidence, and without any record of the Commission, in support thereof. These facts are alleged in the Complaint of the plaintiffs, admitted by the answers of the defendants, in this cause, and are apparent from the face of the order. (Record, p. 28 to 33 incl. Order; 1 to 33 incl. Plaintiffs' Complaint; 78 to 120 incl. Defendants' Answers and Replies).

The admissions by the defendants' answers, in this Cause, are substantially the same and it will suffice to here quote paragraphs 9 and 10 of the answer of The Tri-State Telephone and Telegraph Company, defendant, in this cause, to plaintiffs' complaint, which paragraphs read as follows:

> "That this defendant admits said order of May 2, 1939, was issued by the Railroad and Warehouse Commission without notice or formal hearings first afforded

plaintiffs or subscribers generally, but alleges the Attorney General had notice thereof and participated in the proceedings preliminary to and preceding said order. That these plaintiffs and the subscribers generally were represented therein, not only by the Attorney General, but by the Railroad and Warehouse Commission as a part of its statutory obligations.

This defendant admits no formal testimony was taken from sworn witnesses and hence there was no formal examination of witnesses and no transcript of evidence as such. Defendant denies that such were necessary, or that the Commission was required to have or consider anything more than said order of May 2 shows it to have had and considered." (Rec. pp. 82, 83).

The intervener-respondent, City of Saint Paul, duly intervened in said first mentioned proceeding, embracing said Order of March 31, 1936, before the Commission and actively participated, therein and in the subsequent appeals in the District and Supreme Courts as such party intervener. (Supplemental Record, Complaint in Intervention, City of Saint Paul, Answer and Replies, P. 1-77 inc.) (Rec. Proc. St. Sup. Ct. p. 18).

The City of Saint Paul, intervener-respondent, had no notice of any negotiations for the Commission's said order of May 2, 1939, which was entered as aforesaid solely upon the alleged agreement by and between the Commission, the Attorney General, and the Companies, to the exclusion of the City of Saint Paul. (Rec. pp. 28 to 33 incl. Order) (Rec. Proc. St. Sup. Ct. p. 18) (Rec. pp. 82, 83 Ans.)

This action was instituted May 22, 1939 in the District Court of Ramsey County, Minnesota, by petitioners, Joseph C. Lenihan and Joseph P. Kilroy, as the plaintiffs, as subscribers for telephone service rendered by the defendant

company in the Metropolitan area of Saint Paul on their own behalf and on behalf of all persons, corporations and associations within said metropolitan area similarly situated against the defendants, The Tri-State Telephone and Telegraph Company, the Railroad and Warehouse Commission of the State of Minnesota and the Attorney General of said State.

The petitioners, Joseph C. Lenihan and Joseph P. Kilroy as such plaintiffs in said District Court, by their complaint, amongst other things, alleged that said order of said Commission dated May 2, 1939 was void and in violation of the due process provisions of the Federal Constitution upon the grounds, amongst others asserted in said complaint, that said order was entered by said Commission without notice, hearing, evidence, or essential findings of fact, and was unsupported by any record capable of judicial review, and had for its only basis an alleged agreement, purported to be established only by the recitals of said order, between said Commission, the Attorney General of the State of Minnesota and said Companies whose rates were sought to be fixed by said assailed order. The petitioners by said Complaint, amongst other things, further alleged that said Order did not purport to find that any of the rates fixed by said Order of March 31, 1936 was unfair or unreasonable. (Record p. 1 to 33 incl.) (Rec. pp. 8, 9, 10, 11, Par. 7 Compl.)

The said petitioners, by their said complaint in said District Court, prayed the judgment of said District Court adjudicating and declaring said order of said Commission dated May 2, 1939 void and unenforceable and further permanently enjoining the Railroad and Warehouse Commis-

sion of the State of Minnesota, The Tri-State Telephone and Telegraph Company, and said Attorney General from enforcing or in any manner attempting to enforce said order. (Record p. 12-13).

The intervener-respondent, City of Saint Paul, as subscriber of The Tri-State Telephone and Telegraph Company for telephone service rendered by said defendant in said St. Paul Metropolitan Area, on its own behalf and on behalf of all other subscribers of said defendant company for telephone service rendered by said defendant company in said Metropolitan Area, duly intervened and filed and served its complaint in intervention in said action assailing said Order, dated May 2, 1939, upon substantially the same allegations as those made for its attack by said plaintiff's said complaint, in this cause, whereby it demanded the judgment of said District Court, amongst other things, adjudging and declaring the said Order of the Railroad and Warehouse Commission of the State of Minnesota, dated May 2, 1939, void and of no effect in so far as the same purports to establish, fix or limit telephone rates chargeable for telephone service rendered or to be rendered to subscribers or patrons of defendant The Tri-State Telephone and Telegraph Company within the City of Saint Paul Metropolitan Area as such area is defined by the said Order of said Commission dated March 31, 1936. (Supl. Rec. pp. 1 to 38 incl.) (Rec. Proc. St. Sup. Ct. p. 18).

The said petitioners as such plaintiffs subsequently served, filed and submitted their motion in said District Court in this cause, for judgment on the pleadings. The Intervener City of Saint Paul joined in said motion and its submission for such judgment. (Record, p. 124). (Supl. Rec. pp. 78 to 92 incl.). (Rec. p. 126).

The said motion was duly heard by said District Court on September 26, 1939, and subsequent days, and said District Court on November 14, 1939, duly made, entered and filed its order granting said motion for judgment on the pleadings (Record, p. 125 to 141 incl.) The judgment of said District Court, pursuant to said last mentioned order of said Court, was duly made, entered and filed in said action December 15, 1939, whereby said Court duly adjudged and decreed said order of said Commission, dated May 2, 1939, void and unenforceable insofar as it purports to authorize an increase in the charges for telephone service in the Saint Paul metropolitan exchange area over the charges authorized in the order of the Commission promulgated March 31, 1936, effective June 1, 1936, and that defendants and each of them be permanently enjoined from enforcing said May 2, 1939 telephone rate order in the Saint Paul metropolitan exchange area insofar as it purports to authorize charges for telephone service in excess of those authorized by said order of March 31, 1936 (Record, p. 142 to 144 incl.).

The District Court memoranda states the bases upon which said Court predicated its order for judgment and judgment in this cause, and the same disclose that said Court recognized and decided the Federal question of due process presented to said Court by the Complaint and that the decision of said Federal question was necessary to the said determination of the matter presented and was determined by said District Court, in this cause. (Rec. pp. 62, 63, 67, 68, 130, 131, 133, 134, 139).

The petitioners respectfully set forth the following excerpts from the said District Court memoranda:

"It will hardly be questioned that the Commission cannot make a comprehensive revision of an entire telephone rate schedule without determining the fair value of the rate base. An order made without holding a statutory hearing is void. Ohio Bell Tel. Co. vs. Ohio P. U. C., (1937) 301 U. S. 292, 304, 81 L. Ed. 1093. This case likewise points out emphatically the necessity that the evidence on which findings are based be known." (Record, pp. 62, 63).

"The defendants' contentions upon this point, then reduce themselves to this: 'The Commission and the Attorney General represent the public, including the subscribers; hence they are authorized without notice to the public or subscribers to waive notice on their behalf of a contemplated action to increase telephone rates; having waived such notice on their behalf no notice to the public or subscribers was necessary.' Thus, by the simple device of waiver, the Commission immunizes its orders against attack for want of notice, hearings, evidence and findings, and thereby effectually and successfully cuts off a judicial review of its actions. If the Attorney General is construed to be the representative for the subscribers with authority, on their behalf, to waive notice, hearings, evidence and findings, then he, in effect, may consent to the exercise of legislative power by an administrative body in an unconstitutional manner and in violation of express statutory requirements. The Court finds itself constrained to reject the claim that the Commission and the Attorney General, although representing the public and the subscribers, have authority to waive notice, hearings, evidence and findings. Indeed, it appears to be conclusively demonstrated in an exhaustive annotation in 79 L. Ed. at page 474 et seq. that such a delegation of legislative authority would be unconstitutional. See also Annotations in 12 A. L. R. 1435, 54 A. L. R. 1104, 92 A. L. R. 400." (Record pp. 67, 68).

The Tri-State Telephone and Telegraph Company, alone, appealed from said District Court judgment in this cause, to the Supreme Court of the State of Minnesota (Record, pp. 145 to 147 incl.). The Railroad and Warehouse Commission of the State of Minnesota, the Attorney General of the State of Minnesota and other defendants, exclusive of said appellant Company, made no effort to appeal from said District Court judgment, and none of them appeared or participated in any of the proceedings of the said State Supreme Court, in this cause (Record, Proc. St. Sup. Ct. pp. 1 to 20 incl.).

The said appeal of The Tri-State Telephone and Telegraph Company to said State Supreme Court from said judgment of said District Court was heard and said State Supreme Court entered its opinion thereon in said Court on the 5th day of July, 1940, providing for the reversal of said District Court judgment (Record, Proc. St. Sup. Ct. pp. 1 to 20 incl.).

The said State Supreme Court, by its order dated August 19, 1940, stayed all proceedings upon said appeal in said State Supreme Court except the entry of said final judgment (Record, Proc. St. Sup. Ct. pp. 23, 24).

The final judgment of said State Supreme Court reversing said judgment of said District Court was entered and docketed in said State Supreme Court on the 21st day of August, 1940 (Record, Proc. St. Sup. Ct. pp. 29, 30).

The said State Supreme Court, by its said opinion and final judgment, in this cause, held that the said order of said Commission, dated May 2, 1939, was valid, regardless of the fact that said order was made without notice of hearing, without evidence, and contained no findings of

fact based upon evidence (Record, Proc. St. Sup. Ct. pp. 1 to 20 incl.; pp. 29, 30; p. 16, f. 3).

The opinion of the State Supreme Court, in this cause, although it makes no specific reference to the petitioners' claim of a Federal right or to the Federal question presented upon said appeal for its decision, demonstrates that the State Supreme Court did confront and decide said Federal question adversely to the claims of the petitioners and in a manner so as to deny the Federal right to due process secured to them by Section I of the Fourteenth Amendment to the Federal Constitution to insist upon the Commission's compliance in the matter of its said assailed order with the minimal requirements of such due process provisions of the Federal Constitution, which Federal right said petitioners asserted on their own behalf as such subscribers of said Company and on behalf of all others similarly situated, including the intervener, City of Saint Paul (Record, Proc. St. Sup. Ct. pp. 1 to 20 incl.).

The Federal question thus presented for decision by the petitioners in the State Supreme Court was presented for decision to the highest court of the State having jurisdiction, upon said appeal from said District Court judgment, and the decision of said Federal question was necessary to the determination of this cause, and it was actually decided and the final judgment as rendered by the State Supreme Court, in this cause, could not have been given without deciding it (Petitioners' Complaint, Record, pp. 1 to 33 incl. and Record Proc. St. Sup. Ct. pp. 1 to 20 incl.; pp. 29, 30.

The said State Supreme Court, by its opinion in this cause, said:

"In this state by statute the intrastate rates of telephone companies, of railroads and of other public utilities have been delegated to the commission. The statutes prescribe the procedure. Mason Minn. St. 1927, Sec. 5289, relating to telephone companies, requires rates to be fair and reasonable, and declares unreasonable rates unlawful. The next section provides that the rates of the companies shall be filed with the commission. Section 5291 reads: 'Whenever such rates or schedules are found to be unreasonable by the commission, upon its own motion or upon complaint, it shall prescribe reasonable rates to take the place of those found unreasonable and such new rates shall be filed in place of the rates or schedule superseded. No rate filed with the commission shall be changed by any telephone company without an order of the commission sanctioning the same. It shall be unlawful for any telephone company to collect or receive a greater or less rate or charge for any intrastate service rendered by it than the rate or charge named in the schedules on file with the commission, and no new rate shall take effect till the date named by the commission, which shall not be less than ten days after it is filed.' The section implies power in the commission to sanction and approve rates proposed by a telephone company. No procedure is prescribed where the commission of its own accord is of the opinion that the rates proposed are just and reasonable, except as certain sections relating to fixing intrastate rates for railroads are made applicable. If the change of rates is upon the commission's initiative, Sec. 4646 is applicable; but if a change of rates is sought upon complaint of users or patrons of the telephone company the proceeding must follow that indicated by Sec. 4638 to 4641, Mason Minn. St. 1927" (Rec. Proc. St. Sup. Ct. pp. 11, 12).

The said State Supreme Court, by its opinion in this cause, said:

> "But it appears to us that regardless of the fact that the order of May 2, 1939, was made without notice of hearing, without the taking of testimony, and the claimed deficiency as to findings, it is nevertheless valid. The original litigation, instituted by the commission against the company in 1929, was still pending and there was almost a certainty that it would be carried to the United States Supreme Court. Parties to litigation have the right to compose and agree to settle the dispute at any stage of the proceeding. There can be no doubt from the pleadings and the commission's orders that the commission and the company did agree to settle the litigation then pending by superseding the company's rate schedule as fixed by the order of March 31, 1936, by that of the order of May 2, 1939. The attorney general conducted the litigation in behalf of the commission, and also advised it in respect to the settlement thereof, by the order of May 2, 1939. The litigation had been carried on for over nine years at great expense. The commission had heard voluminous testimony upon all phases that enter into the reasonableness of the company's rates. It knew what had transpired since such testimony was submitted in 1934. There is not the slightest hint in the record or in the argument of counsel that the agreement to end the litigation was not made in the utmost good faith. The commission (representing the public and the users of the company's services) and the company were the necessary parties to that litigation. The expenses had been enormous. More were in sight, together with uncertainty and delay, if the company's grievances were carried to the Supreme Court of the United States.
>
> Plaintiffs contend that Sec. 5298 of the code requires the commission to 'give all interested parties a chance

to furnish evidence and be heard.' But that is when the commission deems it needful to have a valuation of all the property invested in the utility, as was done prior to the order of March 31, 1936. And, of course, then Sec. 5307 applies.

We do not overlook the fact that the City of St. Paul and the City of South St. Paul—users of the company's services—were permitted to intervene in the original proceedings, and that the City of St. Paul is an intervener in this action. It does not appear that the City of St. Paul participated in the agreement which resulted in the promulgation of the order of May 2, 1939. But the commission represented one side—the public or users of the services—and the company the other side in the rate fixing controversy. Those two were the necessary parties. * * * We do not think the city's non-participation in the settlement of the litigation vitiated the order made pursuant thereto; for, as stated, its interests were represented by the commission and attorney general" (Rec. Proc. St. Sup. Ct. pp. 16, 17, 18).

The State Statute, Sec. 5308, Mason's Minn. St. 1927, provides for judicial review of a telephone rate order promulgated by said Commission, limited, however, to a review and determination upon the pleadings, evidence and exhibits introduced before the Commission and certified by it. The pertinent portion of said Sec. 5308 reads as follows:

"5308. Mode of procedure for appeals from decisions of commission—Any party to a proceeding before the commission or the attorney-general may make and perfect an appeal from such order as provided in Sections 1971-1972, Revised Laws of 1905, and acts amendatory thereof.

> Upon such appeal being so perfected it may be brought on for trial at any time by either party upon ten days' notice to the other and shall then be tried by the court without the intervention of a jury, and shall be determined upon the pleadings, evidence and exhibits introduced before the commission and so certified by it."

The construction of the said statutes, especially said Sec. 5291, by the State Supreme Court in its said opinion as manifested by the quoted portions thereof results in a denial of due process to the subscribers and patrons of said public utility. The said statutes by said State Supreme Court opinions, are construed as permitting said Commission to prescribe and promulgate telephone rates altering and increasing established rates without the initiation of any proceeding, without any notice of hearing, without any hearing, without the reception of any evidence, without any findings of fact, based upon evidence, and without any supporting record capable of judicial review, solely upon undisclosed and unrecorded information and the agreement or stipulation of the Commission and the public utility to be thus regulated (Rec. Proc. St. Sup. Ct. pp. 16 to 20 incl.).

The Courts, by said Sec. 5308 are limited in their judicial review, of said Commission's rate orders, to a determination upon the pleadings, evidence and exhibits introduced before the Commission and so certified by it. It is manifest that unless the final judgment of the State Supreme Court be reversed, that the courts may be circumvented in the exercise of their jurisdiction to judicially review rate orders promulgated by said Commission, and judicial review thereof in substance denied by a device

such as that used in the promulgation of said order of May 2, 1939, by stipulation or agreement upon a proposed schedule of rates between the said Commission and the public utility telephone company to be thus regulated, and the Commission's order thereupon, without notice, hearing, evidence or findings of fact pertinent to fair value, operating expenses or revenues founded upon evidence, since there would in such cases be an utter lack of supporting record for review and there would thus be no basis upon which the Court might determine whether the prescribed rates be reasonable or otherwise.

QUESTIONS PRESENTED.

(1) Whether said Sec. 5291, Mason's Minn. St. 1927, as construed by said State Supreme Court, in this cause, permitting the prescription and promulgation of a new and higher schedule of telephone rates solely upon the stipulation or agreement of the Railroad and Warehouse Commission of the State of Minnesota and The Tri-State Telephone and Telegraph Company, the public utility to be regulated, results in the denial to subscribers and patrons of the utility of due process or of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

(2) Whether an order of the said Commission, without the initiation of a proceeding therefor by order or complaint, without notice, hearing, the reception of evidence, findings of fact based upon evidence taken and recorded, and the compilation of a record capable of judicial review, is contrary to the due process provisions of Section I of the

Fourteenth Amendment to the Constitution of the United States.

(3) Whether an order of said Commission prescribing and promulgating a new and higher schedule of telephone rates superseding established telephone rates, without a finding of fact based upon competent evidence taken and recorded by the Commission that such established or pre-existing rates are unreasonable, constitutes a violation of the due process provisions of Section I of the Fourteenth Amendment to the Constitution of the United States.

(4) Whether said State Supreme Court, by its said opinion and Final Judgment holding that the order of said Commission dated May 2, 1939 is valid, denied due process of law or equal protection of the laws to the subscribers and patrons of The Tri-State Telephone and Telegraph Company guaranteed to them by Section I of the Fourteenth Amendment to the Constitution of the United States.

(5) Whether the said assailed order of May 2, 1939, as entered by the Commission, supported only by its recitals prescribing rates appreciably in excess of those prescribed by the previous litigated order of March 31, 1936, then the subject of pending appeal in said State Supreme Court after its adjudication as valid and not confiscatory by said District Court judgment and said opinion of said State Supreme Court, violated the minimal requirements of due process guaranteed to the patrons of the regulated utility and the public by Section I of the Fourteenth Amendment of the Federal Constitution.

(6) Whether the construction of said Statute, Sec. 5291, Mason's Minn. St. 1927, by said State Supreme Court, in